



No. 79 - 733

In the
Supreme Court of the United States

OCTOBER TERM, 1979

HIGHWAY & CITY TRANSPORTATION, INC.,
Petitioner,

vs.

VITO BALESTRI,
Respondent.

**BRIEF OF RESPONDENTS IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS**

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OPINIONS BELOW

The statement of the opinions of the Appellate Court of Illinois, First District and the Supreme Court of Illinois are accurately stated in the Petition.

JURISDICTIONAL STATEMENT

Respondent contests the jurisdictional statement of petitioner in view of respondent's contention that no question under the Constitution of the United States arose in and as a result of the decisions of the Appellate Court of Illinois or the Supreme Court of Illinois.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution in pertinent part provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED FOR REVIEW

Whether the defendant-petitioner can claim a violation of rights under the Fourteenth Amendment where the State court reverses and remands a civil jury trial for a new trial solely to determine appropriate damages where the damage award originally determined is so inadequate as to be unjust.

STATEMENT OF THE CASE

This is an action by respondent, Vito Balestri, for damages for personal injuries caused by the negligence of the petitioner in the operation of its loading dock premises on May 16, 1973. This case was heard by a jury during an extensive trial, and on April 8, 1976, a verdict was returned for the respondent in the amount of \$50,000.00. The trial court denied respondent's motion for new trial on the issue of damages only, or, alternatively, a new trial on all issues, and entered judgment on the verdict. From this denial of the motion, respondent appealed to the Appellate Court.

The Appellate Court, by unanimous decision, reversed the judgment of the trial court and remanded the cause for a new trial on damages only. The Supreme Court granted leave to appeal, and upon review, affirmed the decision of the Appellate Court.

SUMMARY OF THE ARGUMENT

It is the position of respondent that there is nothing whatever novel in the opinions of the Appellate and Supreme Courts. Consistent with *Pozzie v. Mike Smith, Inc.*, 33 Ill. App.3d 343, 337 N.E.2d 450 (1975), the instruction given by the trial court was inadequate to provide the jury with appropriate judicial guidance in view of the principal defense of the petitioner that respondent's physical condition was substantially pre-existing. Respondent's tendered instruction, therefore, sought to respond to the emphasis which had been placed on his prior injuries. (Appellate Court Opinion, Pet. p. 22). The Supreme Court correctly observed that in "summarily refusing to give the instruction, the circuit court erred." (Opinion of the Supreme Court of Illinois, Pet. p. 4a). Petitioner had spent a considerable amount of time at the trial level introducing evidence of injuries to respondent which were unrelated and irrelevant to the injuries in issue.

The garden variety question raised here has been raised on many occasions in various state and federal courts in personal injury actions. Petitioner's attempt to raise its alleged grievance to a constitutional plane is totally without merit. If this Court were to accept the instant issues, not even an army of Supreme Court Justices could field the volume.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL QUESTION WHATEVER, LET ALONE A QUESTION OF SUB- STANCE, RAISED IN THIS PETITION.

In view of the proliferation of evidence of prior unrelated injuries, which apparently was petitioner's main defense in the original, plaintiff tendered jury instruction number 12:

"If you find that the defendant was negligent and that its negligence was a proximate cause of injury to and disability of the plaintiff, you should then find for the plaintiff and his right to recover damages for such injuries and disability is not barred or to be limited in any way by the fact, if you find it to be a fact, that the plaintiff's injury and disability resulted from an aggravation of a pre-existing condition by the occurrence in question nor by reason of the fact, if you find it to be a fact, that the plaintiff because of a pre-existing physical condition was more susceptible to injury than other persons might have been."
(C. 161)

This instruction was drafted from the opinion of the Court in *Pozzie v. Mike Smith, Inc.*, 33 Ill. App.3d 343, 337 N.E.2d 450, 453 (1st Dist. 1975). However, the trial court refused the instruction without stating how it was improper in this case.

The Appellate and Supreme Courts properly found that the trial court erred in refusing to properly instruct the jury on the law, as contained in plaintiff's instruction number 12. This error was prejudicial in view of the

fact that defense counsel was allowed to parade this testimony of prior injuries before the jury. The record clearly indicates that, without plaintiff's instruction, the jury was left free to improperly consider plaintiff's past injuries in computing damages.

No constitutional question was raised in the Appellate or Supreme Courts of Illinois. No constitutional questions were addressed in either the Appellate or Supreme Courts. No constitutional question of any substance is raised in the Petition.

CONCLUSION

For the reasons given, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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